SUPREME COURT, U. S.

FILED

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term 1968

No. 1259

JOSEPH SICA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

October Term 1968

No. .....

JOSEPH SICA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Joseph Sica, prays that a writ of certiorari issue to review the judgment of the United States Court for the Ninth Circuit affirming the United States District Court for the Central District of California denying petitioner's motion under Rule 35 of the Federal Rules of Criminal Procedure requesting the sentencing Court to correct its illegal sentence by crediting petitioner with 284 days spent in pre-sentence custody. The District Court denied the Motion as being without merit. The United States Court of Appeals affirmed the District Court's denial.

Citations to Opinions Below.

The opinion of the District Court is appended hereto as Appendix "A."

The opinion of the Ninth Circuit has not yet been reported and is appended hereto as Appendix "B".

Jurisdiction.

The date of the judgment sought to be reviewed and the time of entry is January 17, 1969.

Timely filed petition for rehearing was denied on March 5, 1969.

The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. 1254.

Questions Presented.

In a multiple count indictment, where the petitioner was sentenced to the maximum term on one count and less than maximum on the remaining counts, is he entitled to credit for pre-sentence incarceration under 18 U.S.C. 3568.

Whether the United States Court of Appeals for the Ninth Circuit erred in its application of the law when petitioner was sentenced to a maximum term imprisonment on one count of a multiple count indictment.

Is petitioner entitled to credit for 284 days of pre-sentence incarceration resulting from the death of the trial judge, so as to permit a substitute judge to familiarize himself with the trial transcript.

Whether the failure to credit time served due to withdrawal of bail and the failure to credit time served due to pre-sentence incarceration of 284 days deprives petitioner of his right to Due Process of Law under the 5th Amendment of the Constitution.

Whether a judge, other than the sentencing judge, should pass on petitioner's motion for corrected sentence.

Constitutional Provisions and Statutes Involved.

The United States Constitutional provisions involved are the 5th Amendment to the United States Constitution right to Due Process of Law.

The statutory provisions involved are 18 U.S.C. 3568 and Rule 35 of the Federal Rules of Criminal Procedure.

Statement.

The petitioner, Joseph Sica, is presently serving a sentence in the Federal Penitentiary imposed pursuant to a three count indictment, Count One and Count Four for violation of Title 18 U.S.C. Section 1951, and Count Five for violation of Title 18 U.S.C. Section 371. Count Five has heretofore been reversed by the Ninth Circuit, 314 F. 2d 733-734 (1963).

The maximum sentence for violation of Title 18 U.S.C. Section 1951 is 20 years imprisonment and/or a fine of $10,000.00.

Prior to the pronouncement of sentence, the sentencing judge stated:

> "To allow in full for custody to date of the defendants, CARBO, PALERMO and SICA, one year has been deducted from the sentence now imposed in each instance.
>
> Let it appear and be understood that full and I think generous allowance has been made in this respect in fixing the term of confinement now to be specified. . . ." [Rep. Tr. 8043-8044].

Upon Count One, petitioner received a sentence of 20 years imprisonment and a fine of $10,000.00, the maximum penalty under the law.

Upon Count Four, petitioner was sentenced to a term of 5 years imprisonment to run concurrently with Count One of the indictment.

In his motion for correction of sentence, petitioner alleged that the year credit for custody served prior to sentence as a matter of mechanical calculation, could not have been given by the sentencing Court. The substantive ground on which petitioner's motion was based was precisely the same as that on which the case of *Stapf v. United States,* 367 F. 2d 326 (D.C.C.A. 1966); *Dunn v. United States,* 376 F. 2d 191 (4th Cir. 1967) and *United States v. Smith,* 379 F. 2d 628 (7th Cir. 1967) were based and on which the different circuit Courts of Appeals had ruled favorably.

The Court below did not hold a hearing, reaching its verdict while sitting in judgment of its own discretion, and did not reach the merits of petitioner's motion. The lower court dismised solely on the basis that the language of the Court at the time of the sentence on which petitioner relies, allegedly is "not reasonably, certainly not necessarily, susceptible to the interpretation defendant seeks to have applied thereto."

Although mechanically calculated, the Court below could not have possibly given credit for service of presentence incarceration.

Petitioner seeks to have this Court remand this case to the District Court ordering it to hold a hearing before another Judge to determine the sentencing Judge's original intent at time of sentence, and on the merits of his contention, or, to order the Court below to grant the relief prayed for in petitioner's original motion.

Reasons for Granting Writ.

There is a conflict among the various circuit Courts as to the application of credit for pre-sentence incarceration.

The question is not so much whether or not credit should be given, since it is now quite clear that it was the intent of Congress, when it made the 1960 Amendment to 18 U.S.C. Section 3568 that all Federal prisoners must receive credit on their sentence for uncredited time confined in jail prior to sentence.

The decision of the Ninth Circuit Court in this case has rendered ineffectual the 1960 Amendment to Title 18 U.S.C. Section 3586 by accepting the government's contention that "appellant was not entitled as a matter of right to credit towards service of his sentence for days spent in custody prior to imposition of sentence".

Prior to the 1966 Amendment (18 U.S.C. 3568) limited credit was applied for time spent incarcerated while awaiting trial for want of bail to only those cases where the crimes in question set minimum mandatory sentences. The disparity in treatment between such cases and offenses has been recognized to constitute an irrational and arbitrary classification against the defendant in violation of the Fifth Amendment to the United States Constitution.

In *Stapf v. United States,* 367 F. 2d 326 (D.C.A. 1966) the Court perceived no rational basis for a classification whereby credit for pre-sentence custody for lack of bail is required as to minimum term offenses, but is denial as to other less serious offenses. In this connection, the Court noted that neither deterrence, ret-

ribution, reform nor any other consideration provides a rationale for this discrimination.

Moreover, the lack of justification for such distinction is underscored by the legislative history of Section 4 of the Bail Reform Act of 1966, which amended Section 3568 to provide automatic administrative credit to all defendants sentenced after its effective date. In recommending its adoption, the Senate Committee of the Judiciary reported:

> "Witnsses before both the subcommitttees' 1964 and 1965 hearing were unanimous in finding no justification for restricting Section 3568 to minimum term offenses . . ." (S. Rep. No. 750, 89 Cong., 1st Sess. 21 (1965).

In discussing 18 U.S.C. 3568, the court held in *Stapf:*

> "Denial of credit in the context of jurisprudence for others guilty of crime of the same or greater magnitude automatically received credit, would entail an arbitrary discrimination of power and hence the duty of the court to avoid." 367 F. 2d 326, 329.

Probably the most important case in point to Sica's position is *Dunn v. United States,* 376 F. 2d 191 (4th Cir., 1967). The facts of this case are similar to the *Stapf* case in that in both cases the defendants were financially unable to furnish the rquired bond money, and upon conviction the sentencing Judges imposed maximum sentences and denied both defendants credit for the time theretofore spent in jail.

In *Dunn,* the Court quoted Title 18 U.S.C. Section 3568 (1960) and said:

> "While it is true that, literally, this section does not affirmatively require that credit be given for

> presentence custody to defendants not convicted of crime carrying minimum mandatory sentences, a recent decision by the District of Columbia Circuit convincingly demonstrates that affording such credit is not only consistent with the congressional design but is also required by the Fifth Amendment."

The Court of Appeals for the Seventh Circuit recently followed *Stapf* where the defendant was given the maximum sentence. *United States v Smith,* 379 F. 2d 628 (7th Cir., 1967).

From the foregoing it is clear that pre-sentence incarceration should be credited towards service of the sentence imposed by the Court. In the instant case, the sentencing court indicated its intention to give credit for pre-sentence incarceration by the following statement:

> "To allow in full for custody to date of the defendants * * * Sica, one year has been deducted from the sentence now imposed in each instance. Let it appear and be understood that full and I think generous allowance has been made in this respect in the fixing of the term of confinement now to be specified." [Rep. Tr. 8043-8044].

It was the intent of the court to run Count Four concurrently with Count One, for as a matter of mechanical calculation, by adding one year to Counts One and Four the court indicated it had deducted from the determined sentence; the only Count it could have deducted it from was Count Four. If this was the court's intent, it was an act of mockery to the intent and purpose of Congress in the passage of Section 3568,

United States Code, Title 18, for this did not reduce his sentence one day for pre-sentence incarceration.

The conflict is manifested by the various rulings of the Courts:

In *Padgett v. United States,* No. 11,495, July 5, 1967, 382 F. 2d 649, the Fourth Circuit held that it was open for determination in each case whether credit had been given regardless of whether the prisoner received the maximum or a lesser term.

The Fifth Circuit in the revised opinion of *Bryans v. Blackwell,* No. 24,641, December, 1967, 387 F. 2d 764 basically adopted the view of the District of Columbia Circuit *i.e.* that there is a conclusive presumption that credit was given except in cases where the prisoner's sentence and his jail time combined exceed the maximum allowable.

The District Court for the Northern District of Georgia, Atlanta Division, in *Sellers v. United States No. 11239,* December 15, 1967, applied the *Blackwell, supra,* opinion to the *Sellers* case.

In *Aldridge v. United States,* .... F. 2d .... (No. 22-941, 9th Cir. decided January 17, 1969), the defendant was sentenced to a term of seven years for each of 2 counts, instead of the maximum term of fifteen (15) years, which might have been imposed, and in making the sentences concurrent instead of consecutive. In denying the relief sought, the Court stated:

> "Aldridge, however, was not given the maximum statutory term, and the sentence imposed on each count was actually eight years shorter than the maximum. It is thus mathematically possible that the sentencing judge gave credit in computing the sentence."

In the *Sellers* case, *supra,* Sellers theoretically could have received 60 years, had all twelve of his 5-year sentences been made to run consecutively. However, the Court reasoned, in view of the fact that he was sentenced to two five year consecutive sentences with the balance made concurrent, "clearly the sentencing judge gave a maximum sentence within the scope of the Bryans decision."

In the instant case, petitioner was sentenced to the maximum term of twenty (20) years on Count One and five (5) years on Count Four, which was to run concurrent with the sentence imposed on Count One.

As stated by the Circuit Court, 9th Circuit in *Lee v. United States,* 400 F. 2d 185 at page 187:

> "On the first issue, it is the opinion of the majority of this court that is this case Lee received the maximum sentence provided by law, that is, a prison term of five years for each of the two violations of 18 U.S.C. Section 500 for which he was convicted. The fact that the judge elected to run the terms concurrently rather than consecutively is immaterial."

Again commencing on page 187, the Court states:

> "These considerations and others, note for example the established rule on appeal that where concurrent sentences are imposed under a multi count conviction, the appellate court needs to consider and affirm only one of them, we think require the conclusion that each conviction is separate and if the statutory maximum term is imposed, the order that the sentences run concurrently does not vitiate the contention that defendant received the maximum prison sentence."

The lower Court misapplied the case of *Aldridge* in affirming the judgment of the District Court. This case involved a situation where defendant was not given the maximum statutory term, wherein, in the case here presented, Sica received the maximum term. Even in the case of *Aldridge*, the Court stated:

> ". . . if a maximum sentence was imposed, it is obvious that the sentencing judge did not allow credit for pre-sentence time spent in jail."

The only similarity between the *Aldridge* case and the case at bar is that in both cases, the sentencing judge stated in his order denying the Rule 35 motion, that he did take into consideration, at the time of sentencing, the time spent in pre-sentence custody.

In the *Aldridge* case, it was mathematically possible that the sentencing judge gave credit in computing the sentence because the maximum sentence was not imposed. In the present case, a maximum sentencing having been imposed on Count One, it was mathematically impossible that the sentencing judge gave credit in computing the sentence.

As stated by the Second Circuit in *Sobel v. United States,* .... F. 2d .... (No 33029 decided January, 1969) in accepting and adopting the rule laid down in *Stapf v. United States, supra,* it held:

We accept and adopt the rule laid down in *Stapf* that:

> "Wherever it is possible, as a matter of mechanical calculation, that credit could have been given, we will conclusively presume it was given. The problem and expenditure of resources which would be caused by allowing each prisoner to at-

tempt to demonstrate that in his particular case credit was not given, we feel, outweigh any possible unfairness. Sincer here the defendants were sentenced to a maximum allowable term of imprisonment, the length of sentence itself conclusively shows that credit was not given."

Conclusion.

The deviations in applying credit for pre-sentence incarceration in the various circuits has been set forth above and petitioner contends that in utilizing the *Aldridge* case as the determining factor in refusing to grant his request for corrected sentence, the United States Court of Appeals for the Ninth Circuit applied incorrect legal principles of law.

For the reasons above set forth, the petition for certiorari should be granted.

Respectfully submitted,

F. FILMORE JAFFE,
Attorney for Petitioner.

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October Term 1968
No. 1259

JOSEPH SICA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI.

(Appendix A.)
(Appendix B.)

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APPENDIX A.

Order Denying Defendant's Motion to Correct Sentence.

United States District Court, Southern District of California, Central District.

Joseph Sica, Petitioner, v. United States of America, Respondent. No. 27,973—Geo. Boldt-CD.

Filed: May 1, 1968.

The motion of defendant Joseph Sica to correct the criminal sentence imposed upon him in the above cause on December 2, 1961, and the memoranda in support and opposition thereto, have been fully reviewed and considered.

The language of the Court at the time of the sentence on which defendant Sica relies is not reasonably, certainly not necessarily, susceptible to the interpretation defendant seeks to have applied thereto. It is hereby certified the Court has not at any time intended such interpretation. In fact, full allowance was made for all time in custody served by defendant Sica prior to sentencing in fixing the further time to be served by defendant at 20 years as provided in the written sentence and judgment as entered. The Court considers and finds this clearly shown by the sentencing language referred to.

The Court finding no error or mistake in the sentence and judgment imposed on defendant Sica, his motion for correction of the sentence and judgment is without merit and should be and hereby is denied.

IT IS SO ORDERED this 29th day of April, 1968.

GEORGE BOLDT
United States District Judge

APPENDIX B.

Office of the Clerk, U. S. Court of Appeals, P. O. Box 547, San Francisco, California 94101.

March 5, 1969.

Messrs. Jaffe, Osterman & Soll, Attorneys at Law, 6380 Wilshire Blvd., Suite 900, Los Angeles, Calif. 90048.

Dear Sir:

The Petition for a Rehearing heretofore filed in case No. 23031—Joseph Sica v. USA was this day denied.

Pursuant to Rule 41(a), and unless stayed by the order of the Court, a certified copy of the judgment of this Court under said Rule will be due to issue on the expiration of seven (7) days from the date hereof.

Sincerely,

Wm. B. Luck,
Clerk.

Opinion of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals, for the Ninth Circuit.

Filed Jan. 28, 1969.

Joseph Sica, Appellant, vs. United States of America, Appellee. No. 23,031.

On Appeal from the United States District Court for the Central District of California.

Before: BARNES, HAMLIN and ELY, Circuit Judges.

PER CURIAM:

The judgment is affirmed. *Cf. Aldridge v. United States,* ..... F.2d ..... (No. 22,841, 9th Cir., decided January 17, 1960).

Stanley N. Barnes,
O. D. Hamlin,
Walter Ely
United States Circuit Judges

BRIEF FOR THE UNITED STATES IN OPPOSITION

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1259

JOSEPH SICA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1961, petitioner was convicted in the United States District Court for the Central District of California on three counts of an indictment which charged interstate conspiracy to extort and coerce (Counts 1 and 4; 18 U.S.C. 1951), and conspiracy to communicate threats by means of interstate commerce (Count 5). On December 2, 1961, he was sentenced to twenty years' imprisonment and a fine on Count 1, and to five years' imprisonment on Counts 4 and 5, to be served concurrently with the sentence imposed on Count 1 (Pet. 3–4; 3 R. 3045, 3047).[1] Petitioner's offenses were in further-

[1] "R." refers to the three-volume court of appeals record on file with the clerk of this Court.

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ance of an effort to control boxing throughout the United States. *Carbo* v. *United States,* 314 F. 2d 718 (C.A. 9), certiorari denied, 377 U.S. 953. The Count 5 conviction was set aside on appeal, the court of appeals noting that such modification had no effect on the sentence in view of the concurrent sentences on Count 4 and Count 1 (314 F. 2d at 733–734).

In 1968, petitioner, pursuant to Rule 35, F.R. Cr. P., sought correction of his 1961 sentence. He claimed that the court in 1961 intended to deduct one year from the announced sentence in order to give credit for his pre-sentence custody (1 R. 10), and that by imposing the maximum authorized sentence of imprisonment under Count 1 (twenty years) had failed to do so (1 R. 11–12). In denying relief, the sentencing judge certified that he had not at any time intended any such interpretation (Pet. App. 2; 1 R. 2).

On January 17, 1969, the court of appeals affirmed the denial of the Rule 35 request for correction of sentence (Pet. App. 4), and on March 5, 1969, a petition for rehearing was denied (Pet. App. 3). The petition for a writ of certiorari, which was filed on April 14, 1969, is out of time under Rule 22(2) of the Rules of this Court. *Heflin* v. *United States,* 358 U.S. 415, 418, n. 7. In any event, it is not meritorious.

When petitioner was sentenced, 18 U.S.C. 3568 provided that for those not subject to minimum mandatory sentence, the term of commitment should run from the date of the commencement of the service of the sentence. By the Bail Reform Act of 1966 (P.L. 89–465, Sec. 4, 80 Stat. 214), 18 U.S.C. 3568

was amended so as to provide all defendants with credit for time spent in pre-sentence confinement for want of bail, but the statute was expressly made prospective in application. Congress undoubtedly assumed that, as to prior sentences, the time spent in custody before trial would have been considered by the court in fixing the original sentence. In *Stapf* v. *United States,* 367 F. 2d 326 (C.A.D.C.), it was held that, where the maximum sentence had been imposed prior to the amendment so that it was clear that the sentencing judge had not given credit for the time in custody, the sentence should be revised to afford such credit. The court of appeals there ruled:

> "Wherever it is possible, as a matter of mechanical calculation, that credit could have been given, we will conclusively presume it was given * * *" [367 F. 2d at 330].

The record in the present case shows that the trial court considered the pre-sentence confinement as a factor in fixing the sentence imposed. During the pre-sentence proceedings, counsel for co-defendant Carbo, and petitioner's counsel, in asking for leniency, called the court's attention to the pre-sentence incarceration, "dead time" described as the equivalent of a one-year sentence (3 R. 8010, 8016). The court responded:

> "To allow in full for custody to date of the defendants Carbo, Palermo and Sica, one year has been deducted from the sentence now imposed in each instance * * * allowance has been made in this respect in the fixing of the term of confinement now to be specified" [3 R. 8043–8044; Pet. 3, 7].

The sentencing of petitioner then followed (3 R. 8045, 8047). That everyone at sentencing understood that allowance had been given for the pre-sentence confinement is clear from the fact that more than six years elapsed "without any outcry of innocence or injustice." *Pinedo* v. *United States,* 347 F. 2d 142, 146 (C.A. 9), certiorari denied, 382 U.S. 976. Because petitioner's sentences on separate counts were not made consecutive, he received less than the maximum sentence imposable. The trial court, as it indicated at trial and by its recent certification, considered the pre-sentence confinement as a factor in deciding to impose concurrent, rather than consecutive, sentences. See *Huber* v. *United States,* 390 F. 2d 544 (C.A. 5); *Aldridge* v. *United States,* 405 F. 2d 831 (C.A. 9); *Quarles* v. *United States,* No. 1128 Misc., this Term, certiorari denied, January 20, 1969.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
EDWARD FENIG,
Attorneys.

MAY 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969